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No. 02-1371

In the Supreme Court of the United States

STATE OF MISSOURI, PETITIONER

v.

PATRICE SEIBERT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the holding of *Oregon* v. *Elstad*, 470 U.S. 298, 318 (1985), that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings" applies when the initial failure to give *Miranda* warnings was intentional.

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INTEREST OF THE UNITED STATES

This case presents the question whether a police officer's intentional failure to give *Miranda* warnings before obtaining a voluntary incriminating statement from a suspect precludes the introduction into evidence of a second statement made after *Miranda* warnings. The United States has a substantial interest in the question presented. First, the United States has an interest in introducing into evidence warned incriminating statements that are reliable evidence of guilt, regardless of whether individual federal agents or state officers may have deliberately withheld *Miranda* warnings in their initial questioning of the defendant. See *United States* v. *Orso*, 266 F.3d 1030 (9th Cir. 2001) (en banc), cert. denied, 123 S. Ct. 125 (2002); *United States* v. *Esquilin*, 208 F.3d 315 (1st Cir. 2000). Second, the

United States has an interest in introducing into evidence warned incriminating statements without becoming embroiled in collateral litigation over the mental state of particular federal or state agents who did not administer *Miranda* warnings in their initial questioning of the defendant.

Finally, the question presented in this case is related to the questions presented in two pending cases in which the United States is a party in this Court, *United States* v. *Patane*, No. 02-1183, and *Fellers* v. *United States*, No. 02-6320. *Patane* presents the question whether a failure to give a suspect the warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), requires the suppression of physical evidence derived from the suspect's unwarned but voluntary statement. *Fellers* presents the question whether a second warned statement should be suppressed when a first statement was assertedly taken in violation of the rule in *Massiah* v. *United States*, 377 U.S. 201 (1964).

STATEMENT

Respondent was convicted of second-degree murder for her role in the death of Donald Rector. She was sentenced to life imprisonment. The Missouri Court of Appeals affirmed her conviction and sentence, *State* v. *Seibert*, No. 23729, 2002 WL 114804 (Mo. Ct. App. Jan. 30, 2002), but a divided Missouri Supreme Court reversed and remanded for a new trial, Pet. App. A1-A21.

1. Respondent Patrice Seibert lived with her five sons in a mobile home in Rolla, Missouri. Pet. App. A2. Donald Rector, a 17-year-old with a mental disorder, also lived with respondent. *Ibid.* On February 12, 1997, respondent's 12-year-old son Jonathan, who had a severe case of cerebral palsy, died in his sleep. *Ibid.*

Respondent did not report his death because she feared that, since Jonathan had bedsores, she would be accused of neglecting him. *Ibid.* That same day, in respondent's presence, two of respondent's teen-aged sons and two of her sons' friends discussed a plan to set fire to respondent's mobile home in order to cover up Jonathan's death. *Ibid.* The group decided that Donald Rector should be in the mobile home and die during the fire so that it would not appear that Jonathan had been left alone. *Ibid.* Respondent's oldest son Darian and his friend Derrick were to set the fire. *Ibid.*

With Darian present, Derrick set the fire. Pet. App. A2. Before doing so, Derrick hit Donald, who was having a seizure and convulsing on the floor in the mobile home. *Ibid.* Donald died of asphyxiation during the fire. *Id.* at A3. Respondent was not present when the fire was set. *Ibid.*

Five days later, Richard Hanrahan, a Rolla Police Officer, arranged for St. Louis County Officer Kevin Clinton to arrest respondent at a hospital where her son Darian was being treated for burns that he had suffered during the fire. Pet. App. A3. Hanrahan instructed Clinton not to give respondent the warnings specified by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Pet. App. A3. At approximately 3 a.m., Clinton woke up respondent and transported her to a police station, where Officer Hanrahan was waiting for her. *Ibid.* Officer Hanrahan decided to leave respondent alone in a small interview room for 15-20 minutes to "give her a little time to think about the situation." *Ibid.* After that interval, and without administering *Miranda* warnings, Hanrahan began to question respondent about her role in Donald's death. *Ibid.* Hanrahan questioned respondent for approximately 30-40 minutes. *Ibid.* During that period, Hanrahan squeezed respon-

dent's arm gently and repeated several times "Donald was also to die in his sleep." *Ibid.*; 5 Trial Tr. 937. His questioning did not involve threats, promises, or physical coercion. *Seibert*, 2002 WL 114804, at *4. Respondent eventually admitted that she knew Donald was to die during the fire. Pet. App. A3. After respondent made that admission, Officer Hanrahan gave respondent a 20-minute break for coffee and a cigarette. *Ibid.*

Hanrahan returned to question respondent again, and this time he recorded the conversation on tape. Pet. App. A3. Before resuming his questioning, Hanrahan administered *Miranda* warnings to respondent. *Ibid.* Respondent orally expressed her understanding of each of her *Miranda* rights and documented that understanding by initialing and signing a waiver form. *Id.* at A10 & n.4. After obtaining respondent's waiver, Officer Hanrahan began the second round of questioning by reminding respondent that they had previously discussed what had happened on February 12, 1997. *Id.* at A3. In response to a question about what was to happen to Donald during the fire, respondent stated that Donald was supposed to be taken out of the trailer. *Id.* at A4. That statement prompted Officer Hanrahan to say "didn't you tell me that he was supposed to die in his sleep?" *Id.* at A5. Respondent then admitted that Donald was supposed to die in his sleep. *Ibid.*

Respondent was charged with first-degree murder for her role in Donald's death. *Seibert*, 2002 WL 114804, at *2. Respondent sought to exclude both her unwarned and warned statements from the trial. At a pre-trial suppression hearing, Officer Hanrahan testified that he intentionally decided not to give *Miranda* warnings with the hope that he could obtain an admission of guilt which he could elicit again after providing the prescribed warnings. Pet. App. A4; 2/10/00 Hr'g Tr. 30-38. Officer Hanrahan further testified that he had received training from an institute that promoted that two-stage interview technique and that his current police department subscribed to that training program. Pet. App. A4. The trial court suppressed respondent's unwarned confession, but refused to suppress respondent's warned confession. *Seibert*, 2002 WL 114804, at *5. After a jury trial, respondent was convicted of second-degree murder and sentenced to life imprisonment. Pet. App. A1-A2.

2. The Missouri Court of Appeals affirmed, 2002 WL 114804, holding that the trial court had not erred in admitting respondent's warned confession. *Id.* at *5. Relying on *Oregon* v. *Elstad*, 470 U.S. 298 (1985), the court held that Officer Hanrahan's withholding of *Miranda* warnings before obtaining respondent's first confession did not taint respondent's subsequent warned confession. 2002 WL 114804, at *5-*7. The court explained that under *Elstad*, where an officer withholds *Miranda* warnings before obtaining a first statement but gives *Miranda* warnings before obtaining a second statement, the second statement is admissible, provided that it is voluntarily made. *Id.* at *5. The court rejected respondent's effort to distinguish *Elstad* on the ground that Officer Hanrahan deliberately withheld *Miranda* warnings before obtaining the first statement. The court explained that *Elstad*'s holding did not depend on this Court's evaluation of the officer's state of mind. Instead, the court stated, *Elstad* turned on this Court's conclusion that a failure to give *Miranda* warnings is not a constitutional violation and therefore does not trigger "fruit of the poisonous tree" analysis. *Elstad* also turned, the court said, on the

conclusion that the psychological impact on the suspect of having "let[] the cat out of the bag" does not make a second confession that was preceded by *Miranda* warnings involuntary. *Ibid.* The Missouri Court of Appeals reasoned that there is no "logical distinction" between an intentional and an inadvertent failure to give *Miranda* warnings, because in both cases the impact on the suspect is exactly the same. *Id.* at *7.

In a motion for rehearing or transfer to the Supreme Court of Missouri, respondent argued that *Dickerson* v. *United States*, 530 U.S. 428 (2000), had made clear that *Miranda* is a constitutionally based decision, and had thereby undermined *Elstad*'s holding that a failure to give *Miranda* warnings does not trigger the application of the "fruits of the poisonous tree" doctrine. 2002 WL 114804, at *9. The court of appeals rejected petitioner's argument and denied the motion. The court explained that *Dickerson* had given "tacit approval" to *Elstad*'s holding that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." *Ibid.* (quoting *Dickerson*, 530 U.S. at 441).

3. The Supreme Court of Missouri granted respondent's motion to transfer and reversed. Pet. App. A1-A14. The court recognized that *Elstad* had held that a failure to give *Miranda* warnings before obtaining a first confession does not automatically taint a subsequent warned confession. *Id.* at A6-A7. The court distinguished *Elstad*, however, on the ground that *Elstad* did not involve an intentional decision not to give *Miranda* warnings. *Id.* at A12. The court viewed an intentional failure to give *Miranda* warnings as an improper tactic designed to undermine the suspect's ability to exercise his free will. *Id.* at A9. On that basis, the court concluded that where warnings are

intentionally withheld, only factors such as a lapse in time, a change in place, or a change in questioner can ensure that the second confession is voluntary; a recitation of *Miranda* warnings by itself is insufficient. *Id.* at A10-A11. Finding that Officer Hanrahan had withheld *Miranda* warnings intentionally when he first questioned respondent and that he had questioned respondent a second time within 20 minutes of the first confession in the same place, the court concluded that Hanrahan's "recitation of *Miranda* warnings" could not "resurrect the opportunity to obtain a voluntary waiver." *Id.* at A11. "To hold otherwise," the court concluded, "would encourage future *Miranda* violations" and sanction an "end run" around *Miranda*. *Id.* at A12.

Three judges dissented. They concluded that the majority had failed to follow this Court's binding holding in *Elstad* that uncoercive questioning without *Miranda* warnings does not taint a second warned and voluntary confession. Pet. App. A15-A26.

SUMMARY OF ARGUMENT

In *Oregon* v. *Elstad*, 470 U.S. 298 (1985), this Court held that when officers obtain a voluntary statement from a suspect without having administered *Miranda* warnings, and later obtain a second statement after having administered *Miranda* warnings, the second statement is admissible if it was knowing and voluntary. The Court rejected the proposition that the second statement must be suppressed as the fruit of the poisonous tree. It also rejected the view that the suspect, having let the "cat out of the bag" in the first statement, is disabled from making a knowing and voluntary second confession absent a passage of time or a break in the chain of events.

The holding of *Elstad* was approved by this Court in *Dickerson* v. *United States*, 530 U.S. 428 (2000). *Dickerson* reaffirmed *Miranda* and confirmed that it is a constitutional rule, but also made clear that *Elstad*'s refusal to apply the fruit-of-the-poisonous-tree analysis to unwarned questioning "simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." 530 U.S. at 441. The Court's decision in *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003), refusing to allow a damages action under 42 U.S.C. 1983 for questioning without *Miranda* warnings, also supports the conclusion that there is no completed violation of the Constitution, and thus no basis for fruits analysis, simply because the police obtain a statement without having administered *Miranda* warnings. Both of those cases thus support the continued validity of *Elstad*.

The rationale of *Elstad* does not admit of an exception for cases in which a police officer's failure to administer *Miranda* warnings was intentional. First, *Elstad*'s conclusion that unwarned interrogation does not violate the Fifth Amendment, and thus does not support application of the fruit-of-the-poisonous-tree doctrine, is equally applicable whether the unwarned questioning was intentional or inadvertent. A failure to give *Miranda* warnings establishes only a presumption of compulsion; it does not mean that the statements were actually coerced. Interrogation without *Miranda* warnings also does not complete a constitutional violation; a completed violation can occur only when the unwarned statements are admitted at trial. Accordingly, the reasons why unwarned questioning, by itself, does not violate the Constitution are equally applicable whether the officer's failure to provide warnings was inadvertent or intentional.

Second, *Elstad* concluded that a suspect's provision of a first unwarned statement does not compromise his ability to make a knowing and voluntary decision to speak once he has been given *Miranda* warnings. That reasoning also applies whether the officer's failure to provide warnings was inadvertent or intentional. Unwarned questioning has the same effect on a suspect whether the officer's failure to warn was deliberate or the result of an oversight. And whatever the officer's motives in the initial questioning, the *Miranda* warnings provide the suspect with the information needed to make a voluntary decision to speak in response to later questioning.

In declining to apply *Elstad*, the Missouri Supreme Court relied largely on a deterrence rationale. It concluded that permitting the admission of voluntary warned statements, following intentional interrogation without warnings, would encourage officers to circumvent *Miranda*. That concern is unfounded. The Constitution does not forbid unwarned questioning, and courts should therefore not frame exclusionary rules to deter it. *Miranda* fully serves its purpose of protecting against the risk that a possibly coerced statement might be admitted at trial when unwarned statements are excluded from the government's case in chief.

Even if deterrence of unwarned questioning were a proper goal, there are already adequate incentives in place for officers to give *Miranda* warnings at the outset of custodial interrogation. The exclusion of unwarned statements from the government's case in chief provides a strong incentive to give *Miranda* warnings. An additional incentive flows from the fact that questioning without warnings increases the risk that any statements the suspect makes will be found involuntary, thus jeopardizing the admission of any

later confession. In contrast, if the officer furnishes *Miranda* warnings initially, there are few cases in which a defendant who speaks will be able to show that he did so involuntarily.

On the other side of the scales, the exclusion of a voluntary and warned confession deprives society of highly relevant and probative evidence, thus undermining the truthseeking function of a criminal trial and risking the acquittal of a guilty defendant. That cost outweighs any marginal deterrent effect. The Missouri Supreme Court's rule would also require courts to make difficult inquiries into the motives of particular officers who failed initially to give *Miranda* warnings. And a rule that sought to deter questioning without warnings overlooks that officers might appropriately question a suspect, without administering warnings, in some situations—such as when it might help locate a kidnapping victim, or thwart a terrorist attack. Officers should not have to hesitate before seeking such information because of the concern that the failure to give warnings at the outset might jeopardize the admission of a later warned and voluntary confession.

Finally, the Missouri Supreme Court's holding is not justified by *Elstad*'s limitation of its rule to cases involving neither actual coercion nor "circumstances that are calculated to undermine the suspect's ability to exercise free will." *Elstad*, 470 U.S. at 309. The quoted language in *Elstad* is another way of referring to police conduct that renders a confession involuntary. The central distinction drawn in *Elstad* is between practices that vitiate the voluntariness of a confession and the mere failure to provide the warnings specified by *Miranda*. When a first confession is rendered involuntary by coercive police conduct, this Court has considered factors such as a lapse in time and a break in

events to determine whether a second, warned statement is voluntary. But *Elstad* holds that such an analysis is not required when the first statement is simply unwarned. Creation of a new category of police practices—such as the intentional failure to give warnings—that falls short of coercion yet still may taint the voluntariness of a second statement, is not justified by Fifth Amendment principles. And the concern of the Missouri Supreme Court that an unwarned first confession lets the "cat out of the bag," and thereby vitiates the suspect's ability to make a knowing and voluntary waiver after receiving *Miranda* warnings, was rejected in *Elstad* itself. A defendant may make a knowing and voluntary decision to speak after receiving *Miranda* warnings; the officer's prior intentional elicitation of unwarned but voluntary statements does not invalidate that choice.

ARGUMENT

A POLICE OFFICER'S INTENTIONAL FAILURE TO GIVE *MIRANDA* WARNINGS BEFORE OBTAINING AN INCRIMINATING STATEMENT FROM A SUSPECT DOES NOT TAINT A SUBSEQUENT WARNED STATEMENT

The Missouri Supreme Court held that where an officer intentionally withholds *Miranda* warnings before obtaining a confession, that action, by itself, means that only factors such as a lapse in time, a change in place, or a change in questioner can ensure that a subsequent warned confession is voluntary. Pet. App. A10-A11. That holding conflicts with this Court's decision in *Oregon* v. *Elstad*, 470 U.S. 298 (1985), and constitutes an unjustifiable extension of this Court's decision in *Miranda*.

A. *Elstad* Holds That A Failure To Provide *Miranda* Warnings Does Not Taint A Subsequent Warned Statement

In *Elstad*, two police officers went to Elstad's house with a warrant for his arrest for burglary. Inside the living room, one officer asked Elstad whether he knew why the police had come to talk to him. Elstad admitted that he was at the scene of the burglary. Approximately one hour later, at police headquarters, an officer advised Elstad of his *Miranda* rights for the first time. Elstad waived his rights and confessed his involvement in the burglary. The trial court admitted Elstad's second confession into evidence, and Elstad was convicted. This Court found no error in the admission of the second confession, holding that a police officer's initial failure to administer *Miranda* warnings does not, without more, taint a subsequent warned confession. *Elstad*, 470 U.S. at 300-301.

In reaching that conclusion, the Court first rejected application of the fruit-of-the-poisonous-tree doctrine. Under that doctrine, a confession that is a product of a Fourth Amendment violation is excluded from the defendant's trial, unless intervening events break the causal link between the illegal conduct and the confession so that the confession is sufficiently an act of free will to purge the primary taint. *Elstad*, 470 U.S. at 306. The Court reasoned that the predicate for application of fruits analysis is a "constitutional violation," *id.* at 305, and "a simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." *Id.* at 306 n.1 The Court explained that while "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion" that is "irrebuttable for purposes of the prosecution's case in chief," it "does not mean that the statements received have actually been coerced" within

the meaning of the Fifth Amendment. *Id.* at 307, 310. Accordingly, "the *Miranda* presumption * * * does not require that the statements and their fruits be discarded as inherently tainted." *Id.* at 307. Because a failure to administer *Miranda* warnings is not itself a constitutional violation, the Court concluded, where police obtain an unwarned confession, the admissibility of a subsequent confession does not depend on whether it is the fruit of the first, but on whether it is "knowingly and voluntarily made." *Id.* at 309.

The Court next rejected the Oregon state court's view that where police obtain an unwarned confession, only a lapse of time and change of place are sufficient to ensure that the suspect's waiver of rights and giving of a second statement were voluntary. The Court noted that when a prior confession is actually coerced, those factors are relevant in determining whether "that coercion has carried over into the second confession." 470 U.S. at 310. The Court concluded, however, that where the first confession is unwarned but voluntary, the situation is different. "In these circumstances, a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible. The warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an act of free will." *Id.* at 310-311 (internal quotation marks omitted). The Court noted that the Oregon state court's contrary conclusion was based on its view that, without a sufficient lapse of time, the psychological impact of having "let the cat out of the bag" renders the waiver and second statement involuntary. *Id.* at 311. The Court rejected that analysis, holding that the psychological impact of

having confessed once lacks significance under the Fifth Amendment. *Id.* at 311-314.

B. Subsequent Cases Confirm The Validity Of *Elstad*'s Holding

In *Dickerson* v. *United States*, 530 U.S. 428 (2000), the Court endorsed *Elstad*'s holding that a failure to administer *Miranda* warnings does not trigger "fruit of the poisonous tree" analysis. The Court explained that *Elstad*'s refusal to apply fruits analysis "simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." *Id.* at 441.

Dickerson's approval of *Elstad* is fully consistent with its holding that *Miranda* is a constitutional decision. The constitutional rule of *Miranda* that *Dickerson* reaffirmed is not that the failure to give *Miranda* warnings itself violates the Constitution, but that "unwarned statements may not be used as evidence in the prosecution's case in chief." 530 U.S. at 443-444. As the *Dickerson* Court explained, "we need not go further than *Miranda* to decide this case. In *Miranda*, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, * * * a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt." *Id.* at 442. Accordingly, *Miranda* set forth "guidelines" for the "admissibility in evidence of any statement given during custodial interrogation." *Id.* at 435.

This Court's recent decision in *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003), confirms that the conduct of custodial interrogation without administering *Miranda* warnings is not itself a constitutional violation, and therefore does not trigger fruit-of-the-poisonous-tree

analysis. There, the Court held that a failure to administer *Miranda* warnings does not subject an officer to civil liability under 42 U.S.C. 1983. The four-Justice plurality opinion concluded that because *Miranda* establishes an "exclusionary rule" that is "prophylactic" and that is designed to prevent "the admission into evidence in criminal case[s] of confessions obtained through coercive custodial questioning," a "failure to read *Miranda* warnings * * * d[oes] not violate [a suspect's] constitutional rights." 123 S. Ct. at 2004 (plurality opinion). Justice Kennedy, joined by Justice Stevens, agreed with the plurality that "failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues." *Id.* at 2013. Instead, *Miranda* "mandates a rule of exclusion," and "[t]he exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy." *Ibid.*

Thus, *Elstad*'s holdings remain valid. When an officer fails to administer *Miranda* warnings before obtaining a confession, the admissibility of a subsequent warned confession does not depend on fruits analysis, but on whether the subsequent statement is knowing and voluntary. 470 U.S. at 304-309. Once *Miranda* warnings are given, "the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an act of free will." *Id.* at 311 (internal quotation marks omitted). A lapse of time and change of place are not necessary to ensure that the subsequent statement is voluntary. *Id.* at 311-312.

C. An Officer's Intentional Withholding Of *Miranda* Warnings Does Not Justify An Exception To The Rule Established In *Elstad*

The Missouri Supreme Court concluded that a different analysis applies when an officer deliberately withholds *Miranda* warnings before obtaining a confession. In that situation, the court concluded, an administration of *Miranda* warnings does not provide a sufficient guarantee that a subsequent statement is voluntary. Instead, only factors such as a lapse in time, a change in place, or a change in questioner can provide such a guarantee. Pet. App. A9-A11.

The reasoning of *Elstad* provides no support for the exception that the Missouri Supreme Court created. Although the opinion in *Elstad* referred to the officer's failure to give *Miranda* warnings in that case as an "oversight," 470 U.S. at 316, the officer's mental state was not critical to the Court's rationales. Instead, the rationales on which *Elstad* relied were that the initial taking of an unwarned, but voluntary, statement is not a constitutional violation, and that the suspect's giving of a voluntary statement in unwarned questioning does not taint the voluntariness of a second, warned statement. There is no logical distinction in those rationales between an intentional failure to give *Miranda* warnings and an oversight.

First, an intentional failure to deliver *Miranda* warnings, like an inadvertent one, is not itself a constitutional violation. The Fifth Amendment prohibits the admission of "compelled," or coerced, self-incrimination, and a failure to give *Miranda* warnings "does not *constitute* coercion." *Elstad*, 470 U.S. at 306-307 n.1. Instead, the failure to warn creates only a limited presumption of coercion in the government's case in chief. *Id.* at 306-307. In addition, under *Miranda*, a constitutional violation occurs only when an unwarned statement is admitted into evidence in the government's case in chief. *Dickerson*, 530 U.S. at 442, 444. The failure to give warnings, whether deliberate or inadvertent, does not itself complete a constitutional violation. *Chavez*, 123 S. Ct. at 2004 (plurality opinion); *id.* at 2013 (Kennedy, J., concurring). *Elstad* reasoned that a constitutional violation is a necessary predicate for application of fruit-of-the-poisonous-tree analysis. 470 U.S. at 305-306. Because a failure to give *Miranda* warnings is not itself a constitutional violation, that aspect of *Elstad*'s rationale applies equally whether the failure to warn is intentional or inadvertent.

Second, *Elstad* reasoned that, when the police obtain an unwarned but voluntary statement and then administer *Miranda* warnings, the warnings themselves provide the suspect with the necessary information to make a voluntary and intelligent determination whether to waive the privilege and speak. 470 U.S. at 311. The suspect's prior giving of an unwarned statement does not compromise his ability to waive his rights and make a subsequent voluntary statement. *Id.* at 312. The same reasoning applies whether the initial failure to give warnings was inadvertent or intentional. A suspect is affected by the methods that an officer uses to interrogate him, not by the officer's subjective mental state. See *Moran* v. *Burbine*, 475 U.S. 412, 423 (1986) ("[W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights."); cf. *Stansbury* v. *California*, 511 U.S. 318, 323-325 (1994) (per curiam) (in determining whether a suspect is "in custody," subjective and undisclosed views of the officers are not relevant). If two officers interrogate a suspect, and one intentionally

withholds *Miranda* warnings while the other does so through an oversight, the impact on the suspect will be exactly the same. Furthermore, in both cases, a subsequent administration of *Miranda* warnings will have precisely the same effect. "The warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an act of free will." *Elstad*, 470 U.S. at 310-311 (internal quotation marks omitted). There is therefore no basis for the Missouri Supreme Court's conclusion that an intentional withholding of *Miranda* warnings taints the voluntariness of a subsequent warned confession, even though withholding *Miranda* warnings through oversight does not.

D. A Deterrence Rationale Cannot Justify A Departure From The *Elstad* Rule

1. The Missouri Supreme Court based its decision in large part on a deterrence rationale. It perceived a need to deter the police practice of seeking an unwarned confession as a means of obtaining a subsequent warned confession. In the court's view, allowing the subsequent warned confession to be admitted into evidence in such circumstances "would encourage future *Miranda* violations" and sanction an "end run" around *Miranda*. Pet. App. A12.

Because the Constitution does not forbid the taking of unwarned statements, however, there is no warrant for a court to attempt to deter that practice. *Miranda*'s purposes are fully achieved when an unwarned confession is excluded from the government's case in chief. *Elstad*, 470 U.S. at 318 ("the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied * * * by barring use of the unwarned statement in the case in

chief"); *Chavez*, 123 S. Ct. at 2013 (Kennedy, J.) ("The exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy."). The admission of a subsequent statement that has been preceded by *Miranda* warnings and a valid waiver of rights, and that is otherwise knowing and voluntary within the meaning of the Fifth Amendment, manifests compliance with *Miranda*, not an "end run" around it.

Miranda itself does contain language that purports to establish rules for the conduct of the police. *E.g.*, 384 U.S. at 473-474. Some of this Court's later cases contain similar descriptions of the *Miranda* procedures, see, *e.g.*, *Moran*, 475 U.S. at 420 ("*Miranda* imposed on the police an obligation to follow certain procedures in their dealings with the accused."), and speak of assessing whether particular applications of the *Miranda* exclusionary rule would deter departures from those procedures, see, *e.g.*, *Michigan* v. *Tucker*, 417 U.S. 433, 447-448 (1974). But this Court's understanding of *Miranda* has evolved, and the rule's purpose, as properly understood, is to guard against the risk that *the courts* will erroneously admit a coerced confession; it is not to regulate out-of-court conduct by *the police*. See *Dickerson*, 530 U.S. at 442, 443-444; see also *Chavez*, *supra*. Accordingly, the taking of unwarned statements need not be deterred.

2. Even if deterring the police from failing to give *Miranda* warnings were a valid objective, the Missouri Supreme Court's rule would not be justified. Police officers already have incentives to give *Miranda* warnings, and the Missouri Supreme Court's rule would impose unjustified costs on the administration of justice. See *Elstad*, 470 U.S. at 312 (noting that suppressing a voluntary, warned statement that follows an unwarned statement would come "at a high cost to

legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself").

The exclusion of an unwarned statement itself provides a significant incentive to give *Miranda* warnings. *Harris* v. *New York*, 401 U.S. 222, 225 (1971) ("sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief"). Police officers who engage in the practice at issue here also run the risk that their failure to give *Miranda* warnings, together with other evidence, might lead to a judicial finding that the first confession was coerced. *Davis* v. *North Carolina*, 384 U.S. 737, 740-741 (1966). In the event of such a finding, as explained in *Elstad*, the court would have to examine carefully such factors as lapse of time and change of place to decide whether the coercion "has carried over into the second confession," 470 U.S. at 310, which would jeopardize its admissibility. In contrast, officers who give *Miranda* warnings initially are likely to persuade courts that all the statements they have obtained are voluntary. As this Court has explained, "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer* v. *McCarty*, 468 U.S. 420, 433 n.20 (1984). "Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." *Colorado* v. *Spring*, 479 U.S. 564, 576 (1987). Thus, police

officers already have a strong incentive to give *Miranda* warnings.[1]

Whatever additional deterrent effect could be achieved through the Missouri Supreme Court's rule cannot justify its costs to the administration of justice. "Admissions of guilt are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran*, 475 U.S. at 426 (citation and internal quotation marks omitted). Confessions that are made after *Miranda* warnings and that are found to be voluntary within the meaning of the Fifth Amendment are highly probative and reliable evidence of guilt. See *Arizona* v. *Fulminante*, 499 U.S. 279, 296 (1991) ("[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."). Excluding such confessions interferes with the truthseeking function of criminal trials and runs a serious risk of permitting guilty defendants to go free. See *Elstad*, 470 U.S. at 312 (loss of "highly probative evidence of a voluntary confession" is a "high cost to legitimate law enforcement"); see also *McNeil* v. *Wisconsin*, 501 U.S. 171, 181 (1991) (the "ready ability

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[1] Neither the Federal Bureau of Investigation nor the Drug Enforcement Agency has a practice of deliberately withholding *Miranda* warnings during initial custodial interrogation. According to FBI policy, "[p]rior to custodial interrogation, an accused is entitled to be warned of the right to remain silent and the right to an attorney at this critical stage of the criminal prosecution." *FBI, Legal Handbook For Special Agents* § 7-3.1 (1994). The Drug Enforcement Administration Agents Manual similarly provides that "[p]rior to interviewing any defendant, he/she must be advised of his/her constitutional rights." *DEA Agents Manual* § 6641.32 (2002).

to obtain uncoerced confessions is not an evil but an unmitigated good"); *United States* v. *Washington*, 431 U.S. 181, 187 (1977) ("far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable").

The Missouri Supreme Court's rule would also introduce an additional layer of litigation, fraught with the possibility for error, about the officer's intent. A court would have to probe the thought processes of police officers to decide whether they deliberately withheld warnings in order to facilitate a subsequent warned confession or whether they failed to give warnings for some other reason.

For example, *Miranda* applies only when the suspect is in custody, *Oregon* v. *Mathiason*, 429 U.S. 492 (1977) (per curiam); when the officer engages in interrogation, *Rhode Island* v. *Innis*, 446 U.S. 291 (1980); and when there is not a public safety justification for the questioning, *New York* v. *Quarles*, 467 U.S. 649 (1983). Each of those conditions for application of *Miranda* can raise difficult issues. Under this Court's cases, however, an objective standard is used to determine whether the requirements for application of *Miranda* have been met, which eases judicial administration of *Miranda* and provides workable guidance to police. *Stansbury*, 511 U.S. at 323-325 ("Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by * * * the interrogating officers."); *Innis*, 446 U.S. at 301 ("term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police * * * that the police should know are reasonably likely to elicit an incriminating response" without regard to "the underlying intent of

the police"); *Quarles*, 467 U.S. at 656 (the application of the public safety exception does not depend "on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer"). The Missouri Supreme Court's rule would require a far more difficult and less reliable inquiry into whether officers genuinely believed that one or more of the predicates for *Miranda* warnings was not present, or whether they instead intended an "end run" around *Miranda*. Analysis would be further complicated by the likelihood that officers who fail to give *Miranda* warnings often do so for a mix of reasons.

This Court's decision in *Elstad* illustrates the difficulty of an inquiry into an officer's subjective motivation for failing to give *Miranda* warnings. There, the Court could only speculate that the officer who failed to give *Miranda* warnings in that case may have been uncertain whether the suspect was in custody or may have been reluctant to initiate an alarming police procedure before a different officer spoke to the suspect's mother. 470 U.S. at 315-316. Devoting judicial resources to the resolution of such difficult motive-based inquiries would needlessly complicate judicial decisions about the admissibility of confessions.

The Missouri Supreme Court's intent-based rule would have yet another undesirable effect. There can be entirely appropriate reasons for questioning someone without administering *Miranda* warnings. For example, when an officer seeks information in connection with a terrorism plot, or an officer seeks information to end an ongoing criminal activity such as kidnapping, officers may appropriately find it desirable to question a suspect without giving *Miranda* warnings. If an officer's subjective intent to omit *Miranda* warnings were deemed sufficient to taint a later warned

confession, officers might be deterred from conducting such inquiries for fear of jeopardizing the admissibility of a later warned confession.

E. There Is No Other Basis For Adopting An Intent-Based Exception To The *Elstad* Rule

In seeking to justify an intent-based exception to the *Elstad* rule, the Missouri Supreme Court quoted in part (Pet. App. A9) *Elstad*'s description of its rule as applying where a failure to administer warnings is "unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will." *Elstad*, 470 U.S. at 309. The Missouri Supreme Court regarded an officer's intentional failure to give *Miranda* warnings as a circumstance that is calculated to undermine the suspect's ability to exercise his free will within the meaning of *Elstad*, making *Elstad*'s general rule inapplicable. *Ibid.* The Missouri Supreme Court also quoted in part (Pet. App. A12) language from *Elstad* excepting from its rule cases where officers use "deliberately coercive or improper tactics" in eliciting the first confession, *Elstad*, 470 U.S. at 314, and concluded that an intentional failure to give warnings is an "improper tactic[]." In context, however, the references to "circumstances that are calculated to undermine the suspect's ability to exercise free will" and "improper" tactics are simply alternative ways of describing police practices that undermine voluntariness under the traditional due process inquiry. Because an intentional failure to give *Miranda* warnings does not by itself make a confession involuntary in the due process sense, *Elstad* provides no support for treating intentional failures to give *Miranda* warnings differently from inadvertent ones.

Several considerations support the conclusion that *Elstad* recognized an exception to its rule only for cases where police practices undermine voluntariness under a traditional due process analysis. First, that reading conforms to the *Elstad* Court's description of its holding: "We hold today that a suspect who has once responded to unwarned yet *uncoercive* questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." 470 U.S. at 318 (emphasis added). Second, throughout the opinion, the *Elstad* Court used disjunctive phrases similar to those above to describe the kind of circumstances that would render a confession involuntary under traditional due process analysis. 470 U.S. at 312 ("physical violence or other deliberate means calculated to break the suspect's will"); *id.* at 317 ("inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary"). Third, that reading is consistent with the basic distinction *Elstad* drew between the analysis that applies when a first confession is actually coerced and the analysis that applies when a first confession is simply unwarned. *Id.* at 309-310. In the former situation, factors such as lapse of time and change of place are relevant in deciding whether a subsequent confession is voluntary. In the latter context, the delivery of *Miranda* warnings is an adequate antidote for what made the initial statement inadmissible. *Ibid.*

Finally, the Missouri Supreme Court's suggestion that the police officers in this case engaged in "improper conduct" under the Fifth Amendment when they intentionally failed to give *Miranda* warnings relies on the same "cat out of the bag" reasoning that this Court rejected in *Elstad*. The premise of the state court in *Elstad* was that there is "a subtle form of

lingering compulsion" that police officers exploit when the suspect feels "the psychological impact of [his] conviction that he has let the cat out of the bag and, in so doing, has sealed his own fate." 470 U.S. at 311. The Missouri Supreme Court relied on the same concern here in its reasoning that the unwarned interrogation "was intended to deprive [respondent] of the opportunity knowingly and intelligently to waive her *Miranda* rights." Pet. App. A12.[2]

In *Elstad*, however, the Court rejected the view that the giving of a voluntary but unwarned confession deprives a suspect of the ability to make a voluntary and intelligent waiver of *Miranda* rights. The Court noted that it "has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver." 470 U.S. at 312. The Court explained that "[t]here is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but non-

[2] The Missouri Supreme Court did not suggest that the *Miranda* warnings themselves were deficient, or that the police were required to supply any additional warnings to ensure that respondent's decision to waive her rights was knowing and voluntary. Any such suggestion would conflict with *Elstad*, where this Court rejected the view that an additional warning was required to ensure that Elstad's waiver of his rights was fully informed. 470 U.S. at 316. The Court reasoned that a requirement of an additional warning that the suspect's prior unwarned statement could not be used against him "is neither practicable nor constitutionally necessary." *Ibid.* See also *Moran*, 475 U.S. at 424-427 (declining to add to *Miranda* by requiring an additional warning that an attorney is seeking to contact the suspect).

coercive question." *Ibid.* That is because "[i]t is difficult to tell with certainty what motivates a suspect to speak," *id.* at 314, and a defendant's subjective beliefs about the consequences of giving a statement to the police have no relevance to the question whether his later, warned statements were voluntary. The suspect, having received *Miranda* warnings, can make a voluntary and knowing decision to speak. *Ibid.* ("A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights."). If a defendant's decision to let the cat out of the bag has no bearing on the voluntariness of a subsequent, warned statement, then an officer's subjective desire to induce the defendant to let the cat out of the bag, unaccompanied by coercive conduct, is an unjustified basis for creating a new Fifth Amendment rule that would exclude a subsequent warned and voluntary statement.[3]

[3] In *Elstad*, the Court noted that the "officers did not exploit the unwarned admission to pressure respondent into waiving his right to remain silent." 470 U.S. at 316. Similarly, in this case, Officer Hanrahan did not use respondent's unwarned statement to pressure her into waiving her right to remain silent. After respondent received *Miranda* warnings, she voluntarily waived her right to remain silent, and answered Officer Hanrahan's questions about the fire that resulted in Donald Rector's death, of her own free will. Nor did Officer Hanrahan engage in coercive tactics that undermined the voluntariness of respondent's subsequent warned statements. In response to one of Officer Hanrahan's questions, respondent asserted that Donald was to be taken out of the trailer. At that point, Officer Hanrahan referred to respondent's earlier

Accordingly, as two courts of appeals have concluded, there is no warrant for attributing to *Elstad* an intent to create an exception to its rule for cases where the officer's initial failure to administer *Miranda* warnings was deliberate. See *United States* v. *Orso*, 266 F.3d 1030, 1036-1037 (9th Cir. 2001) (en banc) ("the most persuasive reading of the 'improper tactics' passage is that the Court simply meant to connect such police conduct to the potential involuntariness of the unwarned statements."), cert. denied, 123 S. Ct. 125 (2002); *United States* v. *Esquilin*, 208 F.3d 315, 320 (1st Cir. 2000) ("If we read *Elstad* as a coherent whole, it follows that 'deliberately coercive or improper tactics' are not two distinct categories, * * * but simply alternative descriptions of the type of police conduct that may render a suspect's initial, unwarned statement involuntary."). The Missouri Supreme Court erred in seeking to derive from *Elstad* such an exception.

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unwarned acknowledgement that Donald was to die in the fire. Respondent then admitted that Donald was to die in the fire. Pet. App. A4-A5. Officer Hanrahan's use of respondent's unwarned but voluntary admission that Donald was to die in the fire to question the truthfulness of respondent's assertion that Donald was to be taken out of the fire was entirely legitimate, cf. *Harris*, 401 U.S. at 225-226 (voluntary but unwarned statement may be used for impeachment), and did not impair the voluntariness of respondent's warned admission.

CONCLUSION

The judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted.

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